

84-682

Office - Supreme Court, U.S. FILED OCT 12 1984 ALEXANDER L. STEVAS, CLERK

No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

HELEN T. MONAGLE, Petitioner

against

WILLIAM F. BOLGER, Postmaster General of the

United States, Respondent

On Writ of Certiorari To The United States

Court of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

Helen T. Monagle

78 Bristol Road

Medford, Massachusetts

Pro Se

4428

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR
HARD COPY AT THE TIME OF FILMING.
IF AND WHEN A BETTER COPY CAN BE
OBTAINED, A NEW FICHE WILL BE
ISSUED.

QUESTIONS PRESENTED

- I. Whether Petitioner should be granted a full and fair hearing of the complaint.
- II. Should the motions to amend be granted.
- III. Should the U. S. District Court grant an injunction against the United States Postal Service to protect the Petitioner from further acts of reprisal.

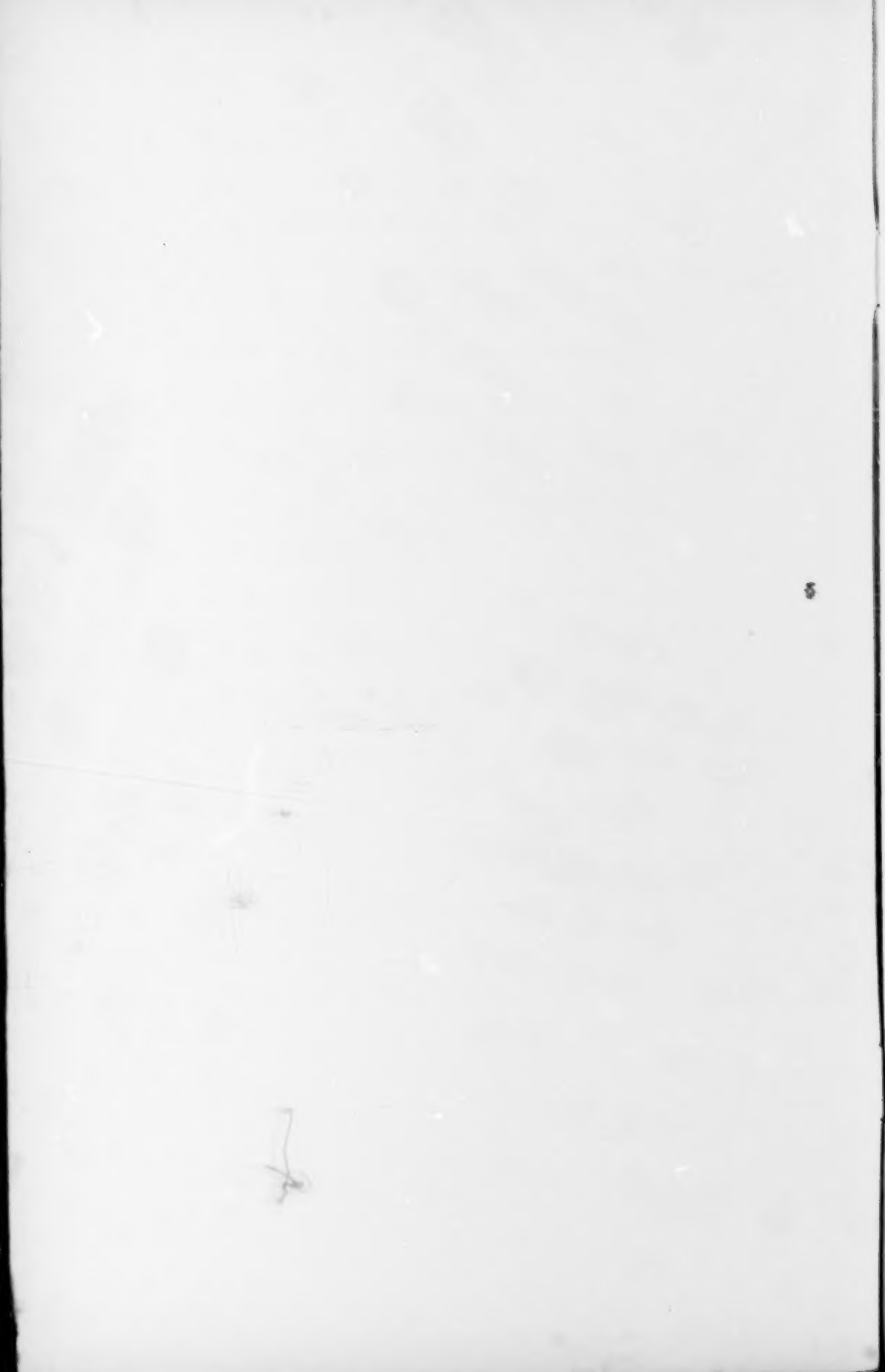


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without remedy at ² law for the injury she
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1. Order of Court of Appeals dated June 13,
1984.

2. Order of Court of Appeals dated July 20,

3. Letter to Clerk of Court of Appeals dated March 28, 1984, with attachments
4. Letter Chief Judge Campbell of the First Circuit dated April 23, 1984

Petitioner prays that a writ of certiorari issue to review the action of the United States District Court in the District of Massachusetts and the United States Court of Appeals for the Second Circuit in this Case.

QUESTION PRESENTED

Whether petitioner should be granted a hearing on the merit of her complaint.

JURISDICTION

This petition for certiorari has been filed within 90 days of the entry of the order of the Court of Appeals on July 20, 1984, denying petitioner's motion for reconsideration of the order of the Court of Appeals of June 13, 1984, denying petitioner's petition for a writ of mandamus. This Court's jurisdiction to review the order below is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the United States Constitution provides:

"No person shall be....deprived of life, liberty, or property, without due process of law....."

Amendment XIV Section I of the United States Constitution provides:

"No state shall.....deny to any person within its jurisdiction the equal protection of the laws"

STATUTES INVOLVED

Section 7 of the Age Discrimination in Employment Act of 1967, 42 U.S.C. (§623(a) provides:

"It shall be unlawful for an employer
(1) to....discriminate against any indivi-

dual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age: (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age..."

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a) provides:

"All personnel actions affecting employees in the United States Postal Service.... shall be made free from any discrimination based on.....sex....."

STATEMENT OF THE CASE

Petitioner is a 61 year old female who has been employed in the Management Sectional

Center of the United States Postal Service in Boston, Massachusetts since 1967. In 1976 she was assigned as a clerk stenographer in the Safety Section. In 1978 she applied for and was awarded the position of Safety Technician, EAS-11. This is an "Upward Mobility Position". Petitioner still holds this position.

Upward mobility positions are required for lower level employees to give them an opportunity for training and advancement within the installation. The next step for progression for the petitioner would be an EAS-14. Management denied petitioner the opportunity for advancement by posting the EAS-14, Safety Specialist, as a new "Upward Mobility" position starting as an EAS-14 and advertised it beyond the normal area of consideration for upward mobility positions. Past practices in the

Safety Section show a pattern of advancement from within the Safety Section. The selectee Frank Dunford was assigned to the Postal Inspection Service in Springfield, Massachusetts thus making him ineligible for an upward mobility position in the Boston Management Sectional Center. Even though the selectee had no specialized experience or mail processing experience which were requirements of the job; he was made best qualified. The petitioner was best qualified because of her specialized experience in the Safety Section from 1976 to 1980 which included some duties and responsibilities of the EAS-14 position advertised. The petitioner worked in mail processing from 1967 to 1976. The petitioner was rated as excellent in the Mail Processing Register for Supervisors and rated good in the Station/

Branch Register for Supervisors. The petitioner had received a special achievement award and other awards. The petitioner's name was illegally removed from the Mail Processing Register for Supervisors without notification to the petitioner in 1979 thus denying opportunities for supervisory positions in mail processing. The petitioner's qualifications were directly related to the position and far exceeded all other applicants for the position.

This action was commenced on November 25, 1980. The complaint alleged that practices engaged in by respondent violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. §623(a) and that such practices entitled the petitioner to, along with other relief, retroactive promotion to the position of Safety Specialist 14, liquidated damages in the form

of back pay in the amount of the difference between what petitioner would have earned from the date on which she should have been promoted and what she actually earned since that date, and an injunction against respondent ordering him to accord petitioner all the benefits and rights enjoyed by employees similarly situated.

Petitioner requested a hearing at the "earliest possible date". Petitioner has requested a trial date or pretrial hearing date on several occasions, but to this date, no trial date or pretrial hearing date has been set by the United States District Court in the District of Massachusetts.

Since petitioner filed the instant suit she has been subjected to numerous acts of reprisal including further age discrimination

and sex discrimination as well. Petitioner has amended her complaint four times to incorporate these additional counts. Petitioner has exhausted her administrative remedy with respect to all charges contained in the instant suit.

On May 17, 1984 petitioner filed a petition for a Writ of Mandamus, seeking the aforementioned relief or at the very least a hearing on the merits of her complaint, with the United States Court of Appeals for the First Circuit. On June 13, 1984, the Court denied petitioner's petition and on July 20, 1984 denied her motion for reconsideration.

REASONS FOR GRANTING THE WRIT

Failure of this court to order the district court to grant petitioner a hearing on the merits of her complaint will work to deprive

her of rights granted to all citizens under the Constitution of the United States and will leave her without remedy at law for the injury she has already suffered and subject to sufferance of further irreparable injury from the conduct of respondent.

A. Deprivation of Constitutional Rights

Petitioner was 57 years old when the instant suit was filed. She is now 61. She will soon reach the mandatory retirement age for federal employees at which time all issues in the instant case, except petitioner's request for back pay, will become moot.

It is clear that respondent through use of numerous dilatory actions, seeks to prevent petitioner from ever proceeding to trial. If respondent, believes that petitioner's suit lacks merit, he would long ago have filed a

Motion To Dismiss under F.R.C.P. 12(b)(6), a Motion for Judgement on the Pleadings under F.R.C.P. 12(c), or a Motion for Summary Judgement under F.R.C.P. 56(b). By not filing such motions, respondent has conceded that petitioner's suit has merit. It is, therefore, in respondent's best interest to see that the instant case does not go to trial.

Petitioner does, however, have a right to be heard. "Under our Constitution there is no procedural right more fundamental than the right of the citizen, except in extraordinary circumstances, to tell his side of the story to an impartial tribunal. As Mr. Justice Frankfurter noted in his concurrence in *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123, 168, 71 S. Ct. 624

646, 95L.Ed. 817(1951): "this Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind even though it may not involve the stigma and hardship of a criminal conviction, is a principle basic to our society."

Winters v Miller 446 F.2d 65, 71 (1971), By not granting petitioner a trial date or even a pre-trial hearing date, the District Court is denying her this right, and the Court of Appeals, by failing to correct this error, committed an equally grievous one.

B. Serious Injury Caused by Statutory Violations

The discriminatory and retaliatory cause of action which respondent has undertaken against petitioner violates several statutes of the United States including, inter alia,

the Age Discrimination in Employment Act of 1967, 29 U.S.C. §623(a) and Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e-16(a). These are serious violations, made more so by the fact that respondent's entire course of conduct has been willful, intentional, malicious, and undertaken in bad faith.

Because of the District Court's inaction, petitioner not only has not been compensated for the injury, she has already suffered by also will be subject to further injury each day until respondent's course of action is halted. The failure of the District Court to grant petitioner a trial date or even a pre-trial hearing date, and the failure of the Court of Appeals to order the District Court to do so, have given respondent a license to deny petitioner her civil rights.

Speedy action of this Court is now petitioner's only means of securing full and adequate relief.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the First Circuit should be granted.

Dated: Medford, Massachusetts

September 22, 1984

Respectfully submitted,

Helen T. Monagle

Pro se



APPENDIX



1
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1376

IN RE
HELEN T. MONAGLE,
PETITIONER,
BEFORE
CAMPBELL, Chief Judge,
COFFIN AND BOWNES,
CIRCUIT JUDGES
ORDER OF COURT
ENTERED JUNE 13, 1984

The petition for a writ of mandamus is denied.

By the Court,

Francis P. Scigliano

Clerk

(Cert. ccs; Clerk, U.S.D.C., Mass., Hon. David
Nelson, and cc: Ms. Monagle, Ms. Saris and Mr.
Slavitt)

2
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1376

IN RE

HELEN T. MONAGLE,

Petitioner

BEFORE

Campbell, Chief Judge,

Coffin and Bownes, Circuit Judges

ORDER OF COURT

Entered July 20, 1984

The motion for reconsideration is denied.

By the Court:

FRANCIS P. SCIGLIANO,

Clerk,

By Richard W. Gordon

Chief Deputy Clerk

(cc: Ms. Monagle, Ms. Saris and Mr. Slavitt)

3a

78 Bristol Road

Medford, Ma 02144

March 28, 1984

Clerk of the U. S. Court of Appeals
for the First Circuit

Francis P. Scigliano

Room 1606 U. S. Post Office & Courthouse Bldg.

Boston, MA 02109

Dear Mr. Scigliano:

The attached is self explanatory.

Please acknowledge receipt of this letter.

An early reply will be appreciated.

Very truly yours,

Helen T. Monagle

Certified Mail No. P 344 889 942

Return Receipt Requested

Attachments: Copy of letter dated 3/23/84 to

Ms. Helen T. Monagle from Andrew

A. Caffrey

Copy of letter to Chief Justice
of District Courts, Andrew
Caffrey dated 3/22/84 from
Helen T. Monagle with
attachments (3 Pages)

3C
UNITED STATES DISTRICT COURT
POST OFFICE AND COURTHOUSE BUILDING
BOSTON, MASSACHUSETTS 02109

CHAMBERS OF

ANDREW A. CAFFREY

CHIEF JUDGE

MARCH 23, 1984

Ms. Helen T. Monagle

78 Bristol Road

Medford, MA 02144

Re: Civil Action No. 80-2635-N

Dear Ms. Monagle:

I wish to acknowledge receipt of your letter of March 22 in which you express dissatisfaction with the handling of a case by my colleague the Honorable David S. Nelson.

Please be advised that federal law, specifically 28 U.S.C. §372, provides:

"(a) any person alleging that a ...

district ...judge...has engaged in con-

duct prejudicial to the effective and expeditious administration of the business of the courts,...may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.

(t)the clerk shall promptly transmit such complaint to the chief judge of the circuit..."

Please be advised that the Clerk of the United States Court of Appeals for the First Circuit is Francis P. Scigliano and his office address is: Room 1606, U. S. Post Office and Courthouse Building, Boston, MA 02109.

Very truly yours,

Andrew A. Caffrey

3e

78 Bristol Road

Medford, MA 02144

March 22, 1984

Chief Justice of District Courts

Andrew Caffrey

1525 U. S. Courthouse and Post Office Bldg.

Boston, MA

Dear Chief Justice Caffrey:

RE: CIVIL ACTION NO. 80-2635-N

Letter sent to your office

dated March 5, 1984

Reference is made to telephone conversation

March 21, 1984 with Jo Epler of the U.S.

District Court's office. The undersigned

made reference to a letter hand delivered to

the Clerk of Court's Office dated March 5,

1984. Jo Epler stated that the letter was

forwarded to Judge Nelson's office and for me

to contact Frank Dello Russo. I requested that your office acknowledge receipt of letter and also state what action your office was going to take. Jo Epler stated no action would be taken by your office. I requested to speak to her supervisor and she terminated the call.

Another call was placed and answered by Mrs. Pap who informed me that Jo Epler was in conference. I requested that a message be delivered to your office; left my name, telephone number, and stated that my age discrimination case was starting its fifth year and made reference to letter sent to your office dated March 5, 1984 regard Civil Action No. 80-2635-N. I requested that your office acknowledge receipt of same and inform the undersigned what action was to be taken;

failure on your part to take no action in regard to my complaint would be in my opinion that you were denying me due process of law; and if I could not receive due process of law through the judicial system, I would have to take my case to the news media. Mrs. Pap said she would deliver message.

Enclosed is a copy of letter hand delivered to the Clerk of Court's Office dated March 5, 1984 for your convenience.

Sincerely,

Helen T. Monagle

Attachment - Letter dated March 5, 1984

Hand delivered March 22, 1984

3h

78 Bristol Road

Medford, MA 02144

March 5, 1984

Chief Justice of District Courts

Andrew Caffrey

1525 U. S. Courthouse and Post Office Bldg.

Boston, MA

Dear Chief Justice Caffrey:

RE: CIVIL ACTION NO. 80-2635-N

As of this date I do not have a trial date, and I believe more than a reasonable period of time has elapsed. "Justice delayed is Justice denied." Why haven't I received a trial date and when will I receive a trial date?

Justification for denial of Motion For Leave to File Amended Complaint dated April 28, 1983 Motion denied August 4, 1983 has not been provided to the undersigned even though dis-

crimination and retaliation was asserted in the Supplementary and Third Amended complaint allowed by Judge Nelson February 15, 1982. In Plaintiff's Opposition to Defendant's Opposition to Plaintiff's Supplementary and Fourth amended Complaint reference is made to Supplementary and Third Amended complaint allowed by Judge Nelson February 15, 1982.

"Although the supplement is late no prejudice will come to the defendants, since there is no discovery to be taken on the matter. 1/The Postal Service was required to conduct an investigation within fifteen days of the filing of the reprisal charge. None was taken. Ms. Monagle has exhausted her administrative remedy, however, Kulkarni v. Hoffman; EPD ____ (D.C. Cir. 1978).

1/Further, no pretrial or trial date has been set.

Justice Goldberg, delivering the opinion for the Court in Foman v. Davis, 371 U.S. 178, 182 (1962) stated that the mandate of Rule 15(a), viz., that leave to amend "shall be freely given" must be adhered to:

"Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules."

Factors such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by allowing the amendment

futility of the amendment, were enumerated by the Court as reasons for denying leave to amend; otherwise, "...the leave sought should, as the rules require, be 'freely given.'" Id. However, lateness alone, without more, is not sufficient to justify denial of leave to file an amended or supplementary complaint.

Eagle Wine and Liquor Company v. Silverberg Electric Company 402 A 2d 31, 32 (D.C. App. 1979), (Even lengthy delay will not provide sufficient ground in itself for refusal to allow amendment to pleading...(a) trial court's refusal to grant leave to amend a pleading on the ground of the lateness or delay alone may properly be reversed.")

Here, Ms. Barry wanted to give the Postal Service sufficient time to conduct an investigation. However none was ever made, even

though Ms. Monagle was timely in filing her charge. See 29 CFR 1613.262 (a) (L).

In addition, the facts being alleged are supplementary, rather than amendments to plead previously-pled facts or to advance the case under another legal theory or to cure deficiencies. Finally, Rule 16, F.edR. Civ. Proced.. contemplates that even as late as the pretrial conference, amendments to the complaint may be necessary.

The Defendant also in their "Second Set of Interrogatories to Plaintiff, "Int. No. 23(a) Identify the specific allegation(s) of discrimination or retaliation that you assert in addition to those alleged in your Supplementary and Third Amended Complaint filed December 27, 1982.

When a charge of Reprisal was accepted by the

court why did I not receive protection from continued retaliatory acts which even endangered my health mentally and physically.

I want to know why the fifth request for the Second Set of Interrogatories sent to the Defendant were not answered. I want to know why the Defendant failed to honor the fifth request to produce documents.

I would like to know why and when the following motions will be acted upon:

Motion to Amend Complaint April 28, 1983

Motion To Compel Defendant To Produce

Following Documents etc. August 25, 1983

Motion - Request dated September 26, 1983.

Motion To Have A Hearing On My Request dated Spetember 26, 1983.

Motion to Compel Request Honored October 4, 1983.

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Supplementary and Fourth Amended Complaint
dated October 24, 1983.

Motion for Order to Impound All Tapes and
Materials Involved in Equal Employment Cases
1-2-0369-3, 1-2-0392-3, 1-2-0393-3, and
1-2-0394-3 dated October 20, 1983.

Thank you for your kind attention in this mat-
ter.

An early reply will be appreciated.

Very truly yours,

Helen T. Monagle

Hand delivered 3/5/84

4A

78 Bristol Road

Medford, MA 02144

April 23, 1984

Chief Judge For The First Circuit

Levin R. Campbell

Office Of The Circuit Executive

United States Court of Appeals

John W. Mc Cormack PO & Courthouse

Boston, MA 02109

Dear Chief Judge Campbell,

Reference is made to your order dated April 11,
1984 in re: Helen T. Monagle.

I request that you reconsider and reevaluate
complaint made to you on March 26, 1984 based
on the following:

The age discrimination complaint was filed
in the U. S. District Court November 1980
and filed with the U.S.P.S. in March 1980.

1978 - An upward mobility position EAS-11 Safety Technician Safety Section, was posted. This according to the EEO policy is classed as a bridge position. I applied and was awarded same. No training or promotion plan as required by Affirmative Action was outlined for this position. I am still in this position 1984.

1979 - An upward mobility position EAS-14 Safety Specialist, Safety Section was posted. Because this position was marked as an upward mobility position it was establishing another bridge position at a higher grade in the Safety Section. This position was awarded to a less qualified younger white male who was assigned to Springfield. This is in violation of Executive Order 11478 and the EEO Act of 1972 and denied me the opportunity to be properly considered in

a fair and equitable merit promotion program. 1979 to present - A number of younger white male and females less qualified than me were placed in the Safety Section at higher grades thus continuing to deprive me of the right to compete in a fair and equitable merit program system as required by law.

In 1981 my name was removed from the Profile Assessment System (PASS) Register.

PASS is a method developed by the U.S.P.S. for competitively selecting initial level supervisors. This system incorporates an assessment of potential supervisor ability by the prospective candidate and an assessment by the candidate's supervisor. I received an excellent rating.

My official Personal File was not properly maintained because it failed to include

postal training and other material. The fact that documents were missing from my Official Personal File denied me proper consideration for promotion opportunities on a continuous basis. There was a letter of complaint to the Postmaster MSC Boston dated March 18, 1976 which was part of my Official Personal File. This letter according to Postal rules and regulations should have been in a grievance file. The failure to record my position as an "Upward Mobility Position" is a violation of Affirmative Action Policy and denied me the counseling, training, and promotion plan mandated by Executive Order 11478 and the EEO Act of 1972.

Records in the court file will indicate that I on several occasions requested the court

to protect me from retaliatory acts and requested a trial date.

Reference is made to Complaint filed November 25, 1980 Section VI First Cause of Action 22. "Plaintiff has no plain, adequate or complete remedy at law to redress wrongs herein alleged. This suit for a declaratory judgment, a permanent injunction, mandamus and damages is her only means of securing full and adequate relief for herself. Unless an injunction is instituted against the Postal Service, plaintiff will continue to suffer irreparable injury from the policies, practices, customs, usages and acts of the defendant, as set forth herein." Also Prayer for Relief Wherefore, "Plaintiff requests that this case be assigned for hearing at the earliest possible date and that the case be expedited

in everway and, upon such hearing grant plaintiff relief."

The preceeding has appeared in Second Amended Complaint filed April 1983, Third Amended and Supplementary complaint filed January 20, 1982; and Supplementary and Fourth Amended Complaint filed October 24, 1983. The Civil Docket Sheet on Civil Action #80-2635-N will show the last action taken by Judge Nelson was August 12, 1983. No action has been taken on my case since then. I have tried to go through the Administrative procedures regarding EEO complaints, and the EEOC has failed to make a Decision on the cases aborted at a hearing held at Boston October 18, and 19, 1983; but they did make a Decision on a later case without my having a hearing. They are inconsistent in their Decision process. I

have gone through the Administrative proceeding and have not received due process of law.

Can I find Justice in the U. S. District Court? I have a right to be heard, and request a date for the trial and answers to my motions with justification. I request the amendments to my complaint be allowed based on the following:

Memorandum of Points and Authorities in

Support of Motion

Although the supplement is late, no prejudice will come to the defendants, since there is no discovery to be taken on the matter. The U. S. Postal Service was required to conduct an investigation. None was taken. No pre-trial or trial date has been set.

Justice Goldberg, delivering the opinion for the Court in *Foman v. Davis* 371, U. S.

178, 182, (1962), stated that the mandate of Rule 15(a), viz., that leave to amend "shall be freely given" must be adhered to:

"Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the general rules. Factors, such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by allowing the amendments, futility of the amendment

were enumerated by the Court as reasons for denying leave to amend; otherwise, "...the leave sought should, as the rules require, be "freely given.'" Id.

However, lateness alone, without more is not sufficient to justify denial of leave to file an amended or supplementary complaint.

Eagle Wine & Liquors Company v. Silverberg Electric Co. 402, 28, 31, 32 (D.C. App. 1979):
(Even lengthy delay will not provide sufficient ground in itself for refusal to grant leave to amend a pleading on the ground of lateness or delay alone may properly be reversed.")

In addition, the facts being alleged are supplementary, rather than amendments to plead previously pled facts or to advance the case under another legal theory or to

cure deficiencies.

Finally, Rule 16, F.Ed. R. Civ. Proced..
contemplates that even as late as the pre-
trial conference, amendments to the complaint
may be necessary.

Failure of the U. S. District Court to issue
an injunction as requested and a speedy hearing
as requested in my complaint November 1980
against the U.S.P.S. gave the U.S.P.S. a license
for continued harassment, physical damage, and
mental stress, unwarranted defamation of my
character, unjustifiable criticism of my
work, and continuous denial of my civil
rights.

Failure of the U. S. District Court to take
action is tantamount to approval.

It is the responsibility of the U. S. District
Court to see that I receive a speedy and just

4k

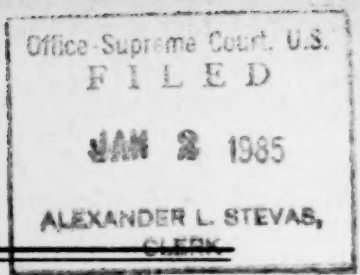
hearing.

Sincerely yours,

Helen T. Monagle

Hand delivered 4/23/84

(2)
No. 84-682



In the Supreme Court of the United States

OCTOBER TERM, 1984

HELEN T. MONAGLE, PETITIONER

v.

WILLIAM F. BOLGER, POSTMASTER GENERAL
OF THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT*

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
*Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217*

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Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e-16	1



In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-682

HELEN T. MONAGLE, PETITIONER

v.

WILLIAM F. BOLGER, POSTMASTER GENERAL
OF THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT*

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the court of appeals erred in denying her petition for a writ of mandamus to compel the district court to order her case set for trial.

1. Petitioner is a 61-year-old woman who holds an EAS-11 position as a safety technician with the Postal Service in Boston. This position, which she has held since 1978, is an "upward mobility position" from which an employee may seek further advancement. Petitioner applied for an EAS-14 position as a Safety Specialist in the same office. This position was awarded to a white male from a different postal office. Pet. 7-9.

On November 25, 1980, petitioner filed this suit alleging violations of the Age Discrimination in Employment Act of 1967, 42 U.S.C. 623(a), and Title VII of the Civil Rights Act

of 1964, 42 U.S.C. 2000e-16. As petitioner notes (Pet. 12), she has amended her complaint four times to include additional allegations.

The progress of the case was marked by repeated discovery requests on both sides and a variety of discovery motions filed by petitioner and respondent. On December 28, 1982, the parties filed a joint motion for extension of time to February 10, 1983, in which to complete discovery. Discovery in fact continued far past this date. Petitioner filed her fifth set of interrogatories and document requests on May 2, 1983, and moved to compel document production on August 25, 1983. Several status conferences were held by the district court and various trial dates were set, the most recent for September 27, 1983. No trial has yet been held, however. Over the course of the case petitioner has been represented by several different attorneys and is now proceeding pro se.

On May 17, 1984, petitioner filed a petition for a writ of mandamus with the First Circuit. The primary relief sought in the writ appears to be an order permitting petitioner to amend her complaint (Pet. App. 4g), although that issue is not raised in the petition for certiorari. Petitioner also requested that a trial date be set (*ibid.*). The First Circuit denied the writ without opinion (Pet. App. 1).

2. Petitioner's claim plainly does not warrant review by this Court. Petitioner has offered no ground whatsoever for concluding that the court of appeals abused its discretion in denying the extraordinary writ.

This Court summarized the principles governing issuance of a writ of mandamus in *Kerr v. United States District Court*, 426 U.S. 394 (1976). The Court noted that "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations," and observed that "the writ 'has traditionally been used in the federal courts only 'to confine

an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so” ’ ” (*id.* at 402, quoting *Will v. United States*, 389 U.S. 90, 95 (1967), quoting *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 26 (1943)). Its treatment of mandamus was founded, the Court stated, upon the interest in avoiding piecemeal litigation and upon the interest in avoiding “the unfortunate consequence of making the [district court] judge a litigant” (*Kerr v. United States District Court*, 426 U.S. at 402, quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953), quoting *Ex parte Fahey*, 332 U.S. 258, 260 (1947)). While the use of mandamus should not be restricted in an unduly narrow fashion, the Court declared that “the fact still remains that ‘only exceptional circumstances amounting to a judicial “usurpation of power” will justify the invocation of this extraordinary remedy’ ” (*Kerr v. United States District Court*, 426 U.S. at 402, quoting *Will v. United States*, 389 U.S. at 95). The Court further observed that “it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed” (*Kerr v. United States District Court*, 426 U.S. at 403; accord *Schlagenhauf v. Holder*, 379 U.S. 104, 112 n.8 (1964)).

Petitioner has offered no basis for concluding that the court of appeals abused its discretion in denying her petition. Nothing suggests that the district court has been derelict in its treatment of petitioner’s case or that it has failed to perform its proper functions. While petitioner’s desire to hasten the judicial process may be understandable, at least part of the time consumed by this case may be attributed to petitioner’s repeated amendments to her complaint, the discovery she has sought, and her changes of counsel. The mere desire for an earlier trial date does not warrant mandamus relief, particularly where petitioner’s own conduct has contributed to the delays.

Petitioner also suggests (Pet. 12) that the court of appeals should have ordered the district court to grant the ultimate relief sought. No basis exists for granting such relief pursuant to a writ of mandamus.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1985

